INDEX

	Page
Statement	1
Argument	5
Conclusion	12

CITATIONS

Cases:

Control of Central Pacific by Southern Pacific, 76 I.C.C. 508	8
Control of D. S. & S. R.R. by Lehigh Valley R.R., 86 I.C.C. 567	8
Denver & Rio Grande W. R. Co. v. *United States*, 387 U.S. 485	8
Florida East Coast Ry. Co. v. *United States*, 259 F. Supp. 993, affirmed *per curiam*, 386 U.S. 544	8
McLean Trucking Co. v. *United States*, 321 U.S. 67	5
Minneapolis & St. L. R. Co. v. *United States*, 361 U.S. 173	5, 9
Penn-Central Merger Cases, 389 U.S. 486	5
United States v. *Southern Pacific Co.*, 290 Fed. 443	8

Statutes:

Clayton Act, Sections 7, 11	5, 7
Section 5, Interstate Commerce Act, 49 U.S.C. 5	2, 7, 8, 9, 12

329-933—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 755

INTERSTATE, INVESTORS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the judgment of a three-judge district court (J.S. A–1—A–39; 287 F. Supp. 374), unanimously sustaining a decision of the Interstate Commerce Commission that acquisition of stock control of three bus companies by Transcontinental Bus System, Inc. (Transcon), was consistent with the

public interest under Section 5 of the Interstate Commerce Act (49 U.S.C. 5). The three companies—Safeway Trails, Inc. (Safeway), Virginia Stage Lines, Inc. (Virginia) and Queen City Coach Company (Queen)—together with their subsidiaries, operate an Atlantic Coast route from Maine to Florida.

The competitive pattern in the industry is undisputed and was correctly set forth in the opinion below (J.S. A–2):

> The intercity nationwide bus industry is dominated by the Greyhound System. Transcon, though only one-fifth the size of Greyhound prior to the acquisitions under review, is its major competitor. Transcon also is a member of National Trailways Bus System (N.T.S.), a nonprofit association whose membership consists of a large number of intercity bus carriers, including the three acquired companies. To foster competition with Greyhound's nationwide operations, the N.T.S. members have adopted Trailways as a common trade name, use uniform paint schemes and markings on their busses, have joint terminals, some through bus arrangements and coordinate advertising, purchasing and other essential functions.
>
> The applications of Transcon to the I.C.C. for approval of the acquisition of Virginia, Safeway and Queen * * * were made to improve its competitive position in the southeastern United States where it had almost no operations. * * *

Appellant is a corporation claiming a prior oral contract to purchase Queen.[1] It makes no such claim as to Virginia or Safeway, but contends generally that the Commission's decision thwarted its efforts to enter the bus industry. The lower court "considered and determined" the merits in detail (J.S. A–6—A–36) but entertained "serious doubts" as to appellant's standing to raise its claims. It noted that appellant had no interest in Virginia or Safeway and was neither a competitor, shipper nor resident of the areas they serve. As to Queen, appellant's only interest was the former contractual claim that it had released with an agreement not to oppose the acquisition (J.S. A–36—A–38).

In the proceeding before the Commission Greyhound opposed the acquisitions, but it did not join in the instant litigation. The Amalgamated Transit Union stipulated that its members would not be adversely affected and obtained a three-year reservation of ICC jurisdiction for the purpose of employee protection. Approval of the acquisitions has been unopposed by any stockholder, passenger, shipper, or local community.

[1] Appellant instituted and, prior to the ICC examiner's report, settled an action for damages in the United States District Court for the Western District of North Carolina. Though appellant now contends that the releases it gave Queen were void, it has taken no action in that court and admittedly retains the $25,000 payment Queen gave it. J.S. A–37—A–38.

The Commission hearings filled nine days in September and October of 1964, and the hearing examiner's report recommending approval was issued in November of 1965 (J.S. A–77—A–133). After exceptions, replies, and numerous other pleadings, the full Commission granted the applications in a report issued in August of 1966 (J.S. A–40—A–76).[2] An ex parte restraining order was granted on September 18, 1966, but vacated on September 21, 1966. No relief was sought from the three-judge court, and the transactions were consummated shortly thereafter.

Much of the present dispute centers around Transcon's purchases, before it received Commission approval, of a minority interest (almost 10 percent) in Queen. During the hearings principal officers of Transcon and Queen gave testimony which can be read as denying such purchases. However, at the time of this testimony 6 percent of Queen's stock had been purchased by a subsidiary of a subsidiary of Transcon. These purchases continued after the close of the hearings until the subsidiary had acquired almost 10%. These matters were first disclosed when Transcon subsequently filed, as a late exhibit, an I.R.S. ruling as to the tax-free nature of the contemplated exchange between Transcon and Queen stockholders. (Item 53, Ex. 168).

[2] The record on appeal consists of some 72 separately numbered items, as listed on the Index to the Record on Appeal in this Court. Item 53, a certified copy of the record made before the Commission, contains the 1285 pages of transcript and 168 exhibits.

Appellant then filed with the Commission a complaint contending that these pre-approval acquisitions violated Sections 7 and 11 of the Clayton Act. This complaint was dismissed on the ground that it embraced facts and matters at issue in the concurrent proceedings under Section 5 of the Interstate Commerce Act. And in its decision in the Section 5 proceedings the Commission presumed that Transcon controlled the purchasing subsidiary. Thus the Commission attributed the early acquisitions to Transcon. It found, however, that the acquisitions did not amount to premature control of Queen or "partial consummation" (J.S. A–55, fn. 7; A–60). Accordingly, it found that approval of the transaction as a whole was consistent with the public interest.

ARGUMENT

Appellant's contentions were thoroughly considered in the extensive opinion of the unanimous court below. The decision is correct and should be affirmed.

1. The lower court's holding that "the Commission carefully explored the effect of the consolidations on the public interest and gave due weight to anti-trust considerations" is fully supported by the record (J.S. A–33). The Commission's analysis of competitive questions as a factor bearing upon the public interest was in accord with established principles and presents no question warranting plenary review. *E.g., McLean Trucking Co.* v. *United States,* 321 U.S. 67; *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173; *Penn-Central Merger Cases,* 389 U.S. 486.

Referring to the examiner's report, the Commission found that the consolidations "will not result in a reduction of competition, but will substantially increase competition" (J.S. A–64). The Trailways system—through its major member, Transcon—will be able to compete more effectively with Greyhound, the giant of the industry. As the district court pointed out (J.S. A–35, fn. 30):

> The record showed that in 1963 Greyhound earned 61% of the operating revenue of Class I Intercity Bus Carriers. Trailways earned 23%, which included the 11.27% earned by Transcon. Including the acquired companies would make Transcon's share 18%.

In particular on the Atlantic Coast, Transcon has had negligible operations and Trailways activities have been limited to such arrangements as could be reached with local independents. Transcon's control of the three companies will result in little loss of competition among the acquired lines because they operate essentially in end-to-end fashion with minimal duplication (J.S. A–34; A–64—A–65).

The Commission noted that the bus industry was different from other areas of the economy and had not developed a "three competitor" pattern (J.S. A–65—A–66). It further found that Greyhound and Trailways had satisfied public demands as to service, schedules, terminals, reliability, cleanliness, and safety, whereas "[M]any independent bus companies have not" (J.S. A–66). In short, the Commission reasoned:

> "Assuming *arguendo* that Greyhound and Trailways constitute a duopoly already, these applications portend nothing new for they involve primarily a strengthening of the Trailways system." [J.S. A–66 [3]]

Moreover, Transcon's control of the three companies would "result in better service to the public by the establishment of more through-service schedules replacing present cumbersome and inadequate pooling arrangements" (J.S. A–34). In addition, the public would receive new and better terminal facilities through central ownership and greater financial resources (J.S. A–34). Finally Transcon itself would achieve substantial savings (J.S. A–65). There was no showing of an adverse effect on competition and the Commission was plainly warranted in finding that these factors justified approval of the merger.

No different result is required because appellant filed a complaint contending that Transcon's early acquisition of almost 10% of Queen stock was violative of Sections 7 and 11 of the Clayton Act. The Commission properly dismissed the complaint, treating the question raised as a facet of the simultaneous Section 5 cases. (J.S. A–60). The lower court correctly held that:

> Whatever merit there might be to plaintiff's theory if a regulated carrier purchased stock

[3] As the lower court recognized (J.S. A–34, fn. 29), the Commission may certificate additional carriers should the public convenience and necessity warrant.

> in a competitor and took no further action, that is not what happened here. Transcon negotiated for the stock of the three carriers with a view toward obtaining control only if the Commission approved. [J.S. A–30; A–31.]

Here the early acquisitions were virtually concurrent with the Section 5 applications, in which competitive considerations were at issue.[4] It would have been futile for the Commission in one proceeding to direct divestiture of the 10%—assuming violation of the Clayton Act—while at the same time holding in another proceeding, as it did, that Transcon control of all of the stock was consistent with the public interest. Moreover, a separate Clayton Act proceeding was unnecessary since transactions may be approved under Section 5 even if otherwise violative of the antitrust laws.[5] Noting "the necessary interaction between the Clayton and Interstate Commerce Acts," the court properly sustained the dismissal of the Clayton Act complaint as "well within" the Commission's discretion under the

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[4] In *Denver & Rio Grande W. R. Co.* v. *United States*, 387 U.S. 485, there was no concurrent Section 5 proceeding and hence no consideration of competitive questions whatsoever.

[5] A prior violation does not restrict the Commission's power of approval under Section 5. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 515–516, recognized in *United States* v. *Southern Pacific Co.*, 290 Fed. 443, 449–450 (D. Utah); *Control of D. S. & S. R.R. by Lehigh Valley R.R.*, 86 I.C.C. 567, 568. See also *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993, 1002, fn. 25 (M.D. Fla.), affirmed *per curiam*. 386 U.S. 544. Whether the early acquisitions are immunized is, of course, a question not involved in the instant case.

circumstances (J.S. A–32). As the court said "There is no requirement that an agency cover the same ground twice" (J.S. A–33).

Finally, there was no abuse of discretion in deciding against the "third force" hypothesis on this record. Appellant offered neither a concrete plan nor a rival application and the argument was properly described by the lower court as "speculative at best" (J.S. A–34). Compare *Minneapolis & St. L. R. Co.* v. *United States, supra.* Apart from the alleged oral contract with Queen stockholders there is no evidence as to any commitments or contracts of appellant or anyone else involving Virginia or Safeway. The record showed, as the lower court stated, that "many previous attempts to consolidate the southeastern Trailways carriers had failed, * * *" (J.S. A–35). In these circumstances, there was no requirement that the applications be denied with the hope that some one else might come along later.

2. The Commission did not abuse its discretion in approving the merger despite Transcon's concurrent acquisition, through its subsidiaries, of a small portion of Queen City stock.

Pending Commission approval of Transcon's Section 5 application, Queen stockholders delivered their stock certificates to a bank and received depository receipts in exchange. During the Commission hearings, and for a time thereafter, a Transcon subsidiary made a series of purchases of these receipts sufficient to create an interest in Queen of almost 10%. At the hearings three principal officers of

Transcon and Queen admitted that some Queen receipts had been traded but gave testimony which can be read as denying knowledge of the identity of the purchaser. The same witnesses also denied that Transcon had entered into a "commitment" or "secret agreement" to buy Queen receipts for cash—an agreement which appellant contends had been concealed to obtain a ruling from the Internal Revenue Service that the consolidation was a tax-free exchange of stock.

The purchases were disclosed to the Commission by Transcon in post-hearing papers in which the company claimed that it did not control the subsidiary which did the buying. The testimony as to the identity of the purchaser of the receipts was immaterial to the decision at bar, since the Commission presumed that Transcon was indeed the buyer (J.S. A–55, fn. 7). The subsequent discovery of the names of the Transcon employees who did the buying, including one of the witnesses who testified, made no difference and did not warrant further proceedings.[6] That there was a question of credibility concerning the purchases was apparent from the face of the record at the time the Commission decided the case. The witnesses had, arguably, denied purchases which were in fact made.

[6] Prior to filing our brief in the lower court we ascertained from Transcon's former general counsel—and disclosed to the court—that the purchases were made by Transcon employees, including counsel and one of the witnesses in question (J.S. A–164, 166). The testimony of this witness, as the lower court said, can be read as "plainly incredible" if it referred to the receipts (J.S. A–10, fn. 13). The testimony of the other two witnesses, as to identity of the purchaser of the receipts was, at the least, less than candid.

Appellant claimed perjury, an allegation noted by the agency in the decision under review (J.S. A–52). After weighing the evidence, the Commission imputed ownership of the 10% to Transcon, but concluded that these early acquisitions were not significant because Transcon had not thereby acquired unauthorized control of Queen, and because the purchases did not constitute "partial consummation" of the transaction (J.S. A–55, fn. 7; A–60).

In concluding that the purchases were not a "partial consummation," the Commission in effect rejected Investors' claim of an undisclosed agreement, and to this extent, accepted the denials by the witnesses before it. There was adequate other evidence justifying a finding of no agreement.[7] After an exhaustive review, the

[7] The receipts were bought by Transcon at prices apparently ranging from $241.25 to $290 per share, which seemingly bore no consistent relationship either to each other or to the then current price for Transcon stock. The selling Queen stockholders did not all use the same broker, and some employed a broker other than one suggested by Transcon. Appellant called no witnesses to substantiate the "agreement" theory though it had a source of inside information as to Queen affairs, had conducted extensive discovery in private Federal court litigation against Queen, and knew the identity of some of the selling stockholders and brokers (Item 53: Tr. 200, 815–816, 851–852, 865, 870; Exs. 97, 98, 105; Broker confirmations attached to Motion of Bruce Love to Amend Answer, filed March 29, 1966, in Docket MC–C–4969; letter of Burt to Butler dated June 12, 1964, filed as enclosure by appellant on Feb. 24, 1966, in Docket MC–C–4969; Exceptions of appellant, Ex. E. Item 41: Numbers 14–16, 18, 19, 32, 39, 59 (showing discovery) (J.S. A–167). As the lower court said, the purchase of some receipts "does not, by itself, establish the existence of such an agreement" (J.S. A–15).

lower court concluded that the Commission's determination was supported by the evidence (J.S. A–15). On the present record, therefore, no question warranting further review is presented here.[8]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[8] Affirmance does not foreclose the Commission from reopening the proceedings should facts be developed at any time warranting such action, since Section 5(9) of the Act confers continuing jurisdiction to issue supplemental orders in merger proceedings, 49 U.S.C. 5(9).

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